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No. 89-423

In the Supreme Court of the United States

October Term, 1989

E. LAURSENS MASKINFABRIK A/S,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA AND FOR THE COUNTY OF LOS ANGELES; J. W. INTERNATIONAL CORPORATION (REAL PARTY IN INTEREST),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

RESPONDENT J. W. INTERNATIONAL CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a California court may properly conclude that the exercise of personal jurisdiction over a foreign manufacturer is proper when that manufacturer:

(1) Manufactures the final product which was sold in California and which was the instrumentality causing injury to the plaintiff in the underlying case, and

(2) Acknowledges that approximately 30 of the subject machines were sold in California pursuant to a written agreement which:

(a) Grants the sole and exclusive franchise and distributorship to sell the manufacturer's products within a territory which includes California to a South Carolina corporation,

(b) Compels the South Carolina distributor to use its best efforts in furthering the sales of the manufacturer's products within the territory which includes California, and

(c) Requires both the manufacturer and the distributor to purchase liability insurance against any and all tort actions resulting from activities within the scope of the written agreement.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
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J. W. INTERNATIONAL CORPORATION
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Respondents.

RESPONDENT J. W. INTERNATIONAL CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. W. INTERNATIONAL CORPORATION (hereinafter referred to as "INTERNATIONAL"), Respondent herein, respectfully requests that the United States Supreme Court deny the Petition brought by E. LAURSENS MASKINFABRIK A/S (hereinafter referred to as "LAURSENS") seeking a Writ of Certiorari to review the decision of the California Court of Appeal, Second Appellate District, Division Five, entered in this case on April 24, 1989 (review thereof having been denied by the

Supreme Court of California by its order of June 29, 1989).

STATEMENT OF THE CASE

The action at issue herein is a suit for indemnity brought by INTERNATIONAL against LAURSENS. LAURSENS is the manufacturer of an allegedly defective cable-stripping machine which is claimed to have caused personal injuries to Olvidio Alvarez, plaintiff in the underlying case. LAURSENS sold the allegedly defective cable-stripping machine to INTERNATIONAL which sold the machine in California pursuant to the terms of a written distributorship agreement executed by and between LAURSENS and INTERNATIONAL.

On July 18, 1985, Olvidio Alvarez filed his Complaint seeking damages for these injuries. On April 22, 1986, a separate action was filed on behalf of the worker's compensation carrier for Mr. Alvarez's employer which sought recovery of the benefits paid to Mr. Alvarez to compensate him for his injuries. LAURSENS was not served in the worker's compensation action. However, on July 16, 1986, INTERNATIONAL filed and served its Answer to the Complaint filed by Mr. Alvarez and concurrently filed its Cross-Complaint. LAURSENS is named as a cross-defendant in that Cross-Complaint and was properly served with Summons and Cross-Complaint in accordance with the provisions of the Hague Convention on the Service of Process on August 20, 1986.

On September 28, 1988, LAURSENS filed its Notice of Special Appearance and Motion to Dismiss for Lack of Personal Jurisdiction. INTERNATIONAL filed its Opposition to said Motion. LAURSENS' Motion was heard on October 24, 1988, in Los Angeles County

Superior Court before the Honorable Eric E. Younger. After considerable deliberation upon the matter, including further research of the issues presented, Judge Younger found it "incredible" that LAURSENS did not know and intend that California sales result from its contract with INTERNATIONAL and accordingly denied LAURSENS' Motion to Dismiss.

On November 7, 1988, LAURSENS filed a Petition in the Second District Court of Appeal seeking extraordinary relief from the denial of its Motion. The Second District Court of Appeal denied LAURSENS' Petition on November 17, 1988.

Thereafter, LAURSENS sought review in the Supreme Court of the State of California. The California Supreme Court granted LAURSENS' Petition for Review and transferred the matter to the Court of Appeal with directions that the Court issue an alternative writ to be heard before that court when the proceeding was ordered on calendar.

Oral argument was heard by Division Five of the Court of Appeal on March 7, 1989. The Court of Appeal filed its opinion on April 24, 1989 in which it affirmed the order of the Superior Court denying LAURSENS' Motion to Quash. The Court of Appeal based its holding upon its findings that LAURSENS' "took steps to assure that its product would be sold in all the states, including California" and that the argument that LAURSENS would be prejudiced by California's exercise of jurisdiction over it was without merit.

LAURSENS filed a Petition for Review of this opinion in the California Supreme Court on May 25, 1989. The Supreme Court of the State of California denied the Petition for Review on June 29, 1989.

REASONS FOR DENYING THE WRIT

U. S. Supreme Court Rule 17 sets forth the considerations governing review on writ of certiorari. In pertinent part, Rule 17 states:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

U. S. Supreme Court Rule 17.1, 28 U.S.C.A.; *see also, Rice v. Sioux City Memorial Park Cemetery* (1955) 349 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (applying the rule that "special and important reasons" are required for the grant of a writ of certiorari).

LAURSENS' Petition for Writ of Certiorari fails to set forth the requisite "special and important reasons" for granting its Petition; therefore, the Petition for Writ of Certiorari should be denied.

I.

The Ruling Of The Respondent Court Is In Accord With The Principles Enunciated In The Published Opinions Of Other Courts.

LAURSENS contends that the opinion of the Court of Appeal which affirms the ruling of the Superior Court of the State of California in and for the County of Los Angeles (which denied LAURSENS' Motion to Dismiss) is contrary to case law. However, quite the opposite is true: the ruling of the Respondent Court denying LAURSENS' Motion to Dismiss is based upon well-established principles of in personam jurisdiction. Similarily, the opinion of the Court of Appeal which affirms the Respondent Court's ruling is in accord with the principles of in personam jurisdiction set forth by

this Court and California law.

A. California *Code of Civil Procedure* Section 410.10 confers broad power on California courts to exercise in personam jurisdiction.

California *Code of Civil Procedure* Section 410.10 confers power on California courts to exercise in personam jurisdiction over non-resident defendants "on any basis not inconsistent with the Constitution of this state or of the United States." California *Code of Civil Procedure* Section 410.10. It is well-settled that California *Code of Civil Procedure* Section 410.10 manifests a legislative intent to "exercise the broadest possible jurisdiction, limited only by constitutional considerations." *Felix v. Bomoro Kommanditgesellschaft* (1987) 196 Cal.App.3d 106, 111, 241 Cal.Rptr. 670 (citing *Sibley v. Superior Court* (1976) 16 Cal.3d 442, 445, 128, Cal.Rptr. 34 and others).

B. Laursens has established sufficient minimum contacts with California to permit the exercise of in personam jurisdiction over it.

Due process requires that non-residents not be haled into local courts solely as the result of "random, fortuitous or attentuated" contacts over which they have no control. *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 476, 85 L.Ed.2d 528. The proper exercise of jurisdiction over a non-resident requires that the non-resident's conduct and connection with the forum state be such that it "should reasonably anticipate being hailed into court there." *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297, 62 L.Ed.2d 490. When a non-resident purposefully directs its activities at forum residents or purposefully avails itself of the privilege of conducting activities within the forum state,

thus invoking the benefits and protection of the forum state's laws, constitutional due process requirements are satisfied. *Hanson v. Denckla* (1958) 357 U.S. 235, 2 L.Ed.2d 1283; *see also, Sibley, supra,* 16 Cal.3d 442, 128, Cal.Rptr. 34.

Thus, in the instant case, if the Respondent Court found that LAURSENS purposefully interjected its products into the forum state, it may properly exercise in personam jurisdiction over LAURSENS for all claims which would not have arisen but for LAURSENS' conduct. *See, Security Pacific National Bank & American International Group v. Derderian & Jocovic* (9th Cir. 1989) 872 F.2d 281.

In its Motion to Dismiss First Amended Cross-Complaint, LAURSENS relied upon the language of a four-justice plurality opinion in *Asahi Metal Industry v. Superior Court* (1987) 480 U.S. 102, 94 L.Ed.2d 92, to advance its argument that the Respondent Court could not assert in personam jurisdiction over it. Respondent Court cited *Asahi* as the controlling authority but found that the facts of the instant case were distinguishable from those in *Asahi.*

In setting forth these factual distinctions, Respondent Court noted:

> "There is at least one major substantive distinction between the factual situation in *Asahi* and the instant case, and that is the presence here of a contractually-created distributorship which virtually guaranteed that the subject machine would be sold (creating a profit for this cross-defendant) in California.
>
> In *Asahi*, the sales (of the subject valve assemblies) were made by the manufacturer to

> a tire maker in Taiwan. While there was evidence in the form of declarations before the court that made it statistically likely that some of the valves would come to California, that is about the most that can be said about the manufacturers 'purposeful interjection' of its product into commerce in this state. In the instant case, manufacturer of industrial machinery voluntarily entered into a contract requiring an American firm to do a number of acts aimed at sales throughout the United States. While reasonable persons could perhaps differ as to this situation if this case arose in a non-manufacturing state, it seems incredible that a party in [LAURSENS'] position would not know and intend that California sales would result from its contract with [INTERNATIONAL], the distributor."

Ruling on submitted matter at C2 (included in LAURSENS' Petition for Writ of Certiorari as Appendix C).

Additionally, Respondent Court pointed out that California has a "citizen-protection" motivation in the instant case which was not present in *Asahi*. Respondent Court stated:

> "A happenstance factor also slightly impacts this case; we are speaking of a 'whole' lawsuit, including Complaint and Cross-Complaints for indemnity; in *Asahi*, the primary case was settled, leaving the Supreme Court properly to conclude that the forum state had no 'citizen-protection' motivation. That is not true here, and surely [LAURSENS'] participation in potential settlement or judgment-payment

> activity is a benefit to plaintiff if he is otherwise entitled to prevail."

Ruling on Submitted Matter at C2-C3.

Similarly, the Second District Court of Appeal pointed out the fallacy of LAURSENS' reliance upon *Asahi*. In its opinion filed in this action on April 24, 1989, the Court of Appeal stated:

> "The existence of the [Distributorship Agreement] and of the fact that [LAURSENS] is the manufacturer of the final product sold by [INTERNATIONAL] distinguishes this case from *Asahi* and from *Felix v. Bomoro Kommanditgesellschaft* (1987) 196 Cal.App.2d 106. Both cases involved defendant component part manufacturers that sold products to other companies not located in the United States for assembly into a final product. The courts in those cases found that the component manufacturer may have known that the part would end up in the forum state through the stream of commerce but did nothing to cause that to happen. For that reason, neither defendant was found to have purposefully availed itself of the market in the forum state. The defendant in *Asahi* 'did not create . . . the distribution system that brought its valves to California.' (480 U.S. at p. 112.) The defendant in *Felix* manufactured parts that were used on Volkswagen cars, and the cars were 'sold and distributed by Volkswagen.' (196 Cal.App.3d at p. 116.) [LAURSENS] on the other hand, did not simply place its product into the stream of commerce without directing its final destination, but *took steps to assure that its*

> *product would be sold in all the states, including California.*"

Opinion of the Court of Appeal at A4 (included in LAURSENS' Petition for Writ of Certiorari as Appendix A) (emphasis added).

The plurality opinion in *Asahi* stated that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the defendant may [be required to] indicate an *intent or purpose* to serve the market in the forum state . . ." *Asahi, supra,* 480 U.S. at 112, 94 L.Ed.2d at 104 (emphasis added). Although the *Asahi* plurality listed examples of such "additional conduct" which were not present in the *Asahi* case, "these examples [were] by no means exhaustive of the ways in which a plaintiff may establish minimum contacts . . . ." *Felix, supra,* 196 Cal.App.3d at 116.

"No bright line may be drawn between instances in which there are sufficient contacts between the forum and the non-resident defendant and those in which there are not." *Felix, supra,* 196 Cal.App.3d at 116. The court must instead look to any conduct intending to show a "purposeful interjection" into the forum state. *Id.*

In the instant case, the Respondent Court and the Court of Appeal found such a "purposeful interjection" of LAURSENS' products into the state. Respondent Court had in evidence before it the Distributorship Agreement executed by and between LAURSENS and INTERNATIONAL dated March 21, 1983 (attached to the Memorandum of Points and Authorities in Opposition to Cross-Defendant's Motion to Dismiss First Amended Cross-Complaint as "Exhibit A"; *Olividio Alvarez v. J. W. International Corp.*, Orange

County Superior Court Civil No. C 557099) which granted the "*sole and exclusive* franchise and distributorship to sell [its] products . . . within a territory consisting of the fifty (50) states of the United States of America and Canada . . ." Distributorship Agreement at Paragraph 1 (emphasis added). It was uncontested that substantial sales of products manufactured by LAURSENS were made in California under this Distributorship Agreement. *See,* Opinion of the Court of Appeal at A3 (taking note of the fact that approximately 30 of LAURSENS' cable-stripping machines have been sold in California).

In examining the Distributorship Agreement, Respondent Court concluded that the "contractually-created distributorship . . . virtually guaranteed that the subject machine would be sold (creating a profit for [LAURSENS]) in California." Ruling on Submitted Matter at C2. Moreover, Respondent Court found that the terms of the Distributorship Agreement and the nature of the parties to its gave rise to a finding that LAURSENS *knew and intended* that California sales would result. Ruling on Submitted Matter at C2; *see also,* Opinion of the Court of Appeal at A4 (LAURSENS "did not simply place its product into the stream of commerce without directing its final destination, but took steps to assure that its product would be sold in all the states, including California"). Despite the recitation in Paragraph 12 of the Distributorship Agreement that the manufacturer and distributor are "independent actors," LAURSENS effectively served the California market through the contractual arrangement.

Paragraph 9 of the Distributorship Agreement requires INTERNATIONAL to use its "best efforts" to further sales of LAURSENS' products and to maintain

standards of operation and service. Paragraph 2 of the Distributorship Agreement dictates that INTERNATIONAL must maintain a workshop and service organization, including the maintenance of an inventory of stock. Paragraph 3 of the Distributorship Agreement mandates that the prices charged by INTERNATIONAL upon resale must be compatible with the prices charged by the manufacturer. Paragraph 4 prohibits INTERNATIONAL from promoting competitive products, conditions the transferral of rights or duties under the contract to third parties upon written approval by the manufacturer, and limits INTERNATIONAL to acquiring certain spare parts from LAURSENS.

Such contractual terms and the conduct which results from compliance with those terms clearly permit Respondent Court and the Court of Appeal to properly find that LAURSENS intentionally serves the market for its products in California. This sound factual basis permitted the Court of Appeal to conclude:

> "In the language of *Asahi*, their relationship with [INTERNATIONAL] shows [LAURSENS'] clear 'intent or purpose to serve the market' in each of the states, including California, by 'marketing the product through a distributor who has agreed to serve as a sales agent' in California."

Opinion of the Court of Appeal at A3-A4 (quoting *Asahi, supra*, 480 U.S. at 112.)

Furthermore, the concurring opinion *Asahi* supports the exercise of in personam jurisdiction over LAURSENS in the instant case. Justice Brennan, with whom Justice White, Justice Marshall and Justice Blackmun joined, stated:

> " The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sales. As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed his goods in the stream of commerce benefits economically from the retail sale of the final product in the forum state, and indirectly benefits from the state's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum state or engages in additional conduct directed toward that state."

Asahi, supra, 480 U.S. at 107, 94 L.Ed.2d at 107.

Hence, Respondent Court's finding of sufficient minimum contacts to exercise in personam jurisdiction and the Court of Appeal's affirmance of that finding is supported by the opinions of all eight justices who decided *Asahi.*

C. The exercise of in personam jurisdiction over Laursens does not offend traditional notions of fair play and substantial justice.

The strictures of the Due Process Clause forbid a state court from exercising in personam jurisdiction over a non-resident defendant under circumstances that would offend "traditional notions of fair play and substantial justice." *Asahi, supra,* 480 U.S. at 113, 94 L.Ed.2d at

105; *Milliken v. Meyer* (1940) 311 U.S. 457, 463, 85 L.Ed. 278. In *Asahi*, this Court explained:

> "[T]he determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interest of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.' "

Asahi, supra, 480 U.S. at 113, 94 L.Ed.2d at p. 105 (quoting *World-Wide Volkswagen, supra,* 444 U.S. at 292).

In the instant case, Respondent Court weighed the various interests and properly concluded that traditional notions of fair play and substantial justice would not be offended by California's exercise of in personam jurisdiction over LAURSENS.

The burden shouldered by LAURSENS in defending the instant case in a California court would not be great. When a manufacturer purposefully avails itself of the privilege of indirectly conducting activities within the forum state, "it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs onto customers, or, if the risks are too great, severing its connection with the state." *World-Wide Volkswagen, supra,* 444 U.S. at p. 297.

It is clear that LAURSENS had notice that it might be haled into a California court. As the Respondent

Court found that LAURSENS purposefully conducted activities within California, LAURSENS was on constructive notice that it was subject to suit there. *See*, Opinion of the Court of Appeal at A4 (LAURSENS "took steps to assure that its product would be sold in all the states, including California"). In fact, LAURSENS had actual notice of a suit pending in Orange County Superior Court regarding one of its cable-stripping machines. *See*, Memorandum of Points and Authorities in Opposition to Cross-Defendant's Motion to Dismiss First Amended Cross-Complaint at 12, fn. 1.

LAURSENS' burden is further lessened by provisions of the Distributorship Agreement. Consistent with the rationale of *World-Wide Volkswagen*, Paragraph 8 of the Distributorship Agreement sets forth provisions for the purchase of liability insurance against "any and all tort actions" resulting from "activities within the scope" of the Distributorship Agreement. Thus, "[b]ecause [LAURSENS] anticipated defending itself against tort litigation and took steps to protect itself, the argument that California's exercise of jurisdiction manifestly prejudices [LAURSENS] must fail." Opinion of the Court of Appeal at A5. Moreover, as the Distributorship Agreement stipulates in Paragraph 15 that it is to be governed by Danish law, LAURSENS will not be prejudiced by submitting to the judicial system of California. Hence, unlike the manufacturer in *Asahi*, LAURSENS cannot complain of undue burden in litigating the instant case in California.

On the other hand, the interests of INTERNATIONAL and California are strong. The policy of judicial economy weighs heavily in favor of adjudicating the indemnity issues concurrently with the issues of liability. To force INTERNATIONAL to litigate the indemnity issues

separately and in a different forum would entail undue expense and burden.

Furthermore, California's interest in protecting its consumers through the economic deterrance of the manufacture of defective products inherent in the payment of damages would not be served as effectively by a piecemeal disposition of the issues rather than the full resolution of all issues involved in the instant case. In its Ruling on Submitted Matter, Respondent Court noted:

> "A happenstance factor also slightly impacts this case; we are speaking of a 'whole' lawsuit, including Complaint and Cross-Complaints for indemnity; in *Asahi*, the primary case was settled, leaving the Supreme Court properly to conclude that the forum state had no 'citizen-protection' motivation. That is not true here, and surely LAURSENS' participation in potential settlement or judgment payment activity is a benefit to plaintiff if he is otherwise entitled to prevail."

Ruling on Submitted Matter at C2-C3.

Thus, Respondent Court and the Court of Appeal had an ample factual basis for finding that due process considerations were satisfied.

II.

The Instant Case Presents No Important Questions Of Law Which Should Be Addressed By This Court.

LAURSENS contends that important issues are raised in the instant case which should be addressed by this Court. Specifically, LAURSENS asks this Court to clarify ambiguities that LAURSENS perceives in the standards for addressing in personam jurisdiction. However,

LAURSENS' contention is without merit.

The instant case simply does not present any question as to the propriety of the exercise of in personam jurisdiction. As set forth in the preceding section, Respondent Court and the Court of Appeal had ample factual foundation upon which to base their findings that due process is not offended by the exercise of in personam jurisdiction over LAURSENS. Hence, the divisions of analysis which LAURSENS contends exist in the lower courts do not affect the outcome of the instant case: under *any* formulation of the standards for the proper assertion of in personam jurisdiction, Respondent Court and the Court of Appeal found that the exercise of in personam jurisdiction over LAURSENS comports with due process.

CONCLUSION

For the foregoing reasons, it is respectfully requested that LAURSENS' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 12, 1989, I served the within *Respondent J. W. International Corporation's Brief in Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 12, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)